IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1368 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

==========

RABARI AMRATBHAI MALABHAI - Appellant
Versus
THE STATE OF GUJARAT - Opponent

==========

Appearance :
MR PRATIK B BAROT for Appellant.
MR KT DAVE, APP for Opponent.

==========

CORAM :	HONOURABLE MR.JUSTICE A.M.KAPADIA
	and
	HONOURABLE MR.JUSTICE K.A.PUJ

Date : 13/03/2007
ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. The appellant – original accused No. 1, namely, Rabari Amratbhai Malabhai has filed this appeal under Section 374 (2) of the Code of Criminal Procedure (for short 'Code') against the judgment and order of the conviction and sentence dated 10.06.2005 passed by the learned Principal Sessions Judge, Mehsana in Sessions Case No. 25 of 2005 whereby the appellant was convicted for an offence punishable under Section 323 of IPC and is sentenced for R.I. of one year and fine of Rs.10,000/- and in default thereof, to undergo S.I. of two months more. The other accused Nos. 2,3 & 4 were acquitted from the charge of offence punishable under Section 324 read with Section 104 of IPC.

2. The brief facts as disclosed in the complaint at Exh.12 and unfolded during the trial are as under :-

3. That the wife of the complainant, namely, Kantaben was a Sarpanch at the time of commission of offence. She informed her husband, Popatbhai Shankarbhai Chaudhary on 12.08.2004 that some Rabaris of Kansara Kui had entered their farms with 30 – 35 cattles and did Bhelan and on asking about the issue to the appellant – original accused No. 1, he told to his wife that she should send Popatbhai to Kansara Kui in the evening. So Popatbhai had a talk with Shankarbhai Fuljibhai, Dalsangbhai, Babubhai, Haribhai Savabhai, Kesangbhai, Devrajbhai and after that they all left in a Jeep from Gadha to Kansara Kui and on the way they met Babubhai Shankarbhai and he also joined them on a journey to Kansara Kui and as per their say, they had gone to Rabari Vas, Kansara Kui and had visited the house of Amratbhai Malabhai Rabari and on reaching there, they informed Amratbhai Malabhai Rabari about the

Bhelan and asked him to come at their place and to see what has happened and on that, Amratbhai Malabhai gave blow to Popatbhai on head so he got injured on head and immediately he has fallen down. People gathered around him and on seeing this incident, all of them ran away from Kansara Kui.

4. It is also the case of the prosecution that Shri Popatbhai Shankarbhai Chaudhary had filed a complaint on 23.08.2004 against the appellant and three others with Mehsana Police Station which is registered vide C.R. No. I-304/2004.

5. After completion of the investigation, the police submitted charge-sheet against the accused and three others in the Court of learned Judicial Magistrate First Class, Visnagar and as the offence punishable under Section 324 read with Section 114 of IPC is exclusively triable by the Court of Sessions, the learned JMFC, Visnagar committed the case to the Court of Sessions at Mehsana under Section 209 of the Code.

6. The learned Sessions Judge, Mehsana to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under Section 324 read with Section 114 of IPC which was read over and explained to them. As the accused pleaded not guilty to the charge and claimed to be tried, they were put to trial and tried in Sessions Case No. 25 of 2005.

7. It is pertinent to note here that there was a cross complaint filed by the appellant – accused against the complainant and five others punishable under Section 302, 307, 326, 324, 147, 148, 149 & 120-B of IPC which was registered vide C.R. No. I-293 of 2004. After filing of the charge-sheet in the said case, the case was committed to the learned Sessions Judge, Mehsana being Sessions Case No.245 of 2005. Both these Sessions Cases were tried and disposed of together by the learned Sessions Judge vide two different judgments. The learned Principal Sessions Judge, Mehsana has held

the accused Nos. 1 & 2 in that case guilty for the offence punishable under Section 304 (1) read with Section 34 of IPC and sentenced them to undergo R.I. for 10 years and to pay fine of Rs.20,000/- and in default of payment of fine, to undergo S.I. for a period of six months. The learned Sessions Judge has also convicted them for the offence punishable under Section 326 read with Section 34 of IPC and sentenced them to undergo R.I. for five years and to pay fine of Rs.10,000/- and in default of payment, to undergo S.I. for a period of two months. The learned Sessions Judge has further convicted them for the offence punishable under Section 324 read with Section 34 of IPC and sentenced them to undergo R.I. for one year and to pay fine of Rs.10,000/- and in default thereof, to undergo S.I. for 15 days. The learned Sessions Judge has exonerated the accused Nos. 3, 4 & 5 from the charges levelled against them. The learned Sessions Judge has also exonerated the accused Nos. 1 & 2 from offences punishable under Section 147, 148, 149, 307 & 120-B of IPC.

8. As far as the present case being Sessions Case No.25 of 2005 is concerned, to prove the culpability of the accused, prosecution has in all examined as many as 4 witnesses, details of which are given in paragraph 4 of the judgment and they are as under :-

Sr. No.	Exh. No.	Particulars
01.	09	Dr. Prakashbhai Pravinbhai Patva
02.	11	Popatbhai Shankarbhai Chaudhary
03.	13	Fuljibhai Dalsangbhai Chaudhary
04.	14	Doljibhai Savjibhai Ansari

9. To prove the case against the accused, the prosecution has also produced and relied upon number of documents which inter alia include Injury Certificate at Exh. 10, original complaint at Exh. 12 etc.

10. After recording of the evidence of the prosecution witnesses was over, the learned Sessions Judge, Mehsana explained the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further

statement, as required under Section 313 of the Code. In their further statement, the accused denied the case of the prosecution by reiterating that they have been falsely implicated in the case. However, they have neither led any evidence nor examined any witness to support their defence.

11. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Sessions Judge, Mehsana has held the appellant – original accused No. 1 guilty and passed an order of conviction and sentence against him to which reference is made in earlier paragraph of this judgment, giving rise to the present appeal.

12. Mr. Pratik Barot, learned advocate appearing for the appellant has submitted that the impugned judgment and order of conviction and sentence passed by the learned Principal Sessions Judge, Mehsana is contrary to law, against the express provision of the statute and against the evidence on record. He has further submitted that the

prosecution has failed to prove the guilt against the accused and the evidence adduced by the prosecution is not even sufficient to raise suspicion against the accused. He has further submitted that the learned Principal Sessions Judge, Mehsana has failed to appreciate the deposition of Dr. Prakashbhai Pravinbhai Patva – Exh. 9 who admitted that injuries inflicted on the complainant is of one blow only and it was simple injury and that injury may be because of number of reasons. He has also stated in his deposition that the injured person was very much conscious at that time. As per the prosecution version, the appellant has given stick blow but under what circumstances the appellant has given a stick blow, that has not been considered by the learned Principal Sessions Judge, Mehsana because the appellant has given a stick blow only after complainant and others have stabbed. Six people were injured and out of which one expired. Hence, the alleged stick blow was purely a matter of self-defence on the part of the accused and considering his self-defence, the appellant ought to

have been acquitted from the charge levelled against him. That the original complainant and others have nowhere stated while filing the complaint that they have injured six persons out of which one has expired. The complainant and others have not given any explanation regarding the injuries and they were hiding the material facts of the case. While convicting the appellant and imposing the sentence, the learned Principal Sessions Judge has not taken into consideration this vital aspect of the matter. The complainant and others have gone to Kansara Kui which is the place of incident and they were armed with deadly weapons with a clear intention of causing serious injuries and causing death. The very fact that the complainant and others have come to the place of the appellant and in self-defence, the appellant has caused the alleged stick blow, is sufficient to acquit the appellant under Section 323 of the IPC and he deserves to be acquitted from the said charge.

13. Mr. Barot has further submitted that the complaint

was filed on 23.08.2004 whereas the alleged incident was taken place on 12.08.2004. No explanation has been given as to why the complaint was filed so late. It appears that the present complaint is filed against the appellant and three others only after the offence was registered against the complainant and the present complaint is nothing but a counter blast of the complaint filed by the present accused along with other persons. He has further submitted that the learned Principal Sessions Judge has not assigned any reason as to how the accused is not entitled to the benefit of Probation of Offenders Act, 1958. The learned Principal Sessions Judge has imposed fine of Rs.10,000/- which is contrary to the statutory provisions contained in Section 323 of IPC. In Section 323 of IPC, the maximum fine which can be imposed upon the accused is of Rs.1,000/-. He has, therefore, submitted that the impugned judgment and order deserves to be quashed and set aside and the accused be ordered to be released forthwith and bail bond furnished by the accused requires to be cancelled.

14. Mr. K. T. Dave, learned Additional Public Prosecutor appearing for the State of Gujarat, on the other hand, has submitted that the case against the accused is proved beyond reasonable doubt and there is no denial of the fact that one stick blow was inflicted on the complainant. Looking to the gravity of the offence, the learned Principal Sessions Judge has rightly convicted the accused under Section 323 instead of 324 of IPC and remaining accused were acquitted by him. He has further submitted that there is a cross complaint filed against the complainant and trial of that case was also conducted and by a separate judgment and order, the accused in that case were convicted. He has, therefore, submitted that no interference is called for in the impugned judgment and order.

15. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and

comprehensive appreciation of all vital features of the case and the entire evidence on record which is read an re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. This court has examined the entire evidence on record for itself independently of the learned Principal Sessions Judge, Mehsana and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the learned Principal Sessions Judge, Mehsana has rightly recorded the order of conviction and sentence.

16. On appreciation of evidence, the learned Principal Sessions Judge, Mehsana has come to the conclusion that the accused No. 1 has given only one stick blow. However, while rejecting the accused No.1's plea that he has given that stick blow in his self defence, he has simply observed that since cross complaints are filed against each other and simply because the accused has raised this plea only in his further statement and not stated on oath, it cannot be

accepted. At the time of occurrence of the event, the presence of the accused was but natural as he was residing there. The complainant and others have gone there and the incident was taken place. The learned Principal Sessions Judge has come to the conclusion that no other accused have played any role and when six persons were injured because of the blows given by the complainant and out of these six persons, one has died, the possibility of self-defence cannot be ruled out.

17. In this view of the matter, even if the accused is held to be guilty under Section 323 of IPC, he deserves for probation under the provisions of Section 3 of the Probation of Offenders Act, 1958. Section 3 deals with Power of court to release certain offenders after admonition. It says that when any person is found guilty of having committed an offence punishable under Section 379 or Section 380 or Section 381 or Section 404 or Section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two

years, or with fine, or with both, under the Indian Penal Code, or any other law, and no previous conviction is proved against him and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under Section 4, release him after due admonition. Here in the present case, the accused is convicted under Section 323 of IPC. He is sentenced for RI of one year and fine of Rs.10,000/-. Imposition of fine of Rs.10,000/- is out of question as Section 323 prescribes the maximum fine of Rs.1,000/- only. There is nothing on record to suggest that the accused was convicted in any other previous offence. The circumstances of the case are such that he has to give stick blow in self-defence. Looking to the circumstances, age of the accused and his

dependents, the Court is of the view that instead of sentencing him to one year RI and fine of Rs.1,000/- or releasing him in probation of good conduct under Section 4 of the Probation of Offenders Act, 1958, the accused deserves to be released after due admonition. In the case of **Basikesan V/s. State of Orissa, AIR 1967 ORISSA 4**, a youth of 20 years was found guilty of an offence punishable under Section 380 of Indian Penal Code, 1860 and no previous conviction was proved against him. It was held by the Court that the offence committed by the accused was not out of deliberate preparation or design but it was a fit case for application of Section 3 and he be released after due admonition. We are of the view that in the present case also, the stick blow given by the accused was not out of any deliberate preparation or design and it is a fit case for application of Section 3 and the accused deserves to be released after due admonition.

18. For the foregoing reasons, the appeal succeeds in

part and accordingly, the appeal is partly allowed qua sentence only. The impugned judgment and order of conviction convicting the accused for commission of offence punishable under Section 323 of IPC is confirmed. However, the sentence imposed on the accused of one year and fine of Rs.10,000/- is altered to mere admonition under Section 3 of the Probation of Offenders Act, 1958.

19. Since the accused is on bail, his bail bond stands cancelled. The appeal is accordingly partly allowed to the aforesaid extent. Amount of fine, if paid shall be refunded to the appellant forthwith.

[A. M. KAPADIA, J.]

[K. A. PUJ, J.]

Savariya